

AUG 01 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DOUGLAS NEIL FLORES-
ALVARENGA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-76507

Agency No. A94-168-839

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted July 24, 2006**

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Douglas Neil Flores-Alvarenga, a native and citizen of El Salvador,
petitions for review of the Board of Immigration Appeals' ("BIA") order

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

dismissing his appeal from an immigration judge's ("IJ") order denying his motion to reopen due to ineffective assistance of counsel. We have jurisdiction pursuant to 8 U.S.C. § 1252. We review the agency's denial of a motion to reopen for abuse of discretion, *de Martinez v. Ashcroft*, 374 F.3d 759, 761 (9th Cir. 2004), and we grant the petition for review.

Once Flores-Alvarenga established that his former counsel's ineffective assistance deprived him of the appellate process, he was entitled to a presumption of prejudice. *See Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004). Although the presumption of prejudice is rebuttable, *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003), no rebuttal evidence was presented here. Because the transcript of the removal hearing is not included in the administrative record, it is unclear how Flores-Alvarenga could have satisfied the BIA's additional requirement that he provide evidence that he would have prevailed on appeal. Accordingly, the BIA abused its discretion in dismissing Flores-Alvarenga's appeal.

PETITION FOR REVIEW GRANTED; REMANDED.